92-1052

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

IN RE SULLIVAN

**Petition For A Writ Of Mandamus
To The United States District Court
For The Middle District Of Florida**

ROD SULLIVAN
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QUESTION PRESENTED

WHETHER THE THREE JUDGE PANEL OF THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA ERRED IN ABSTAINING FROM EXERCISING ITS JURISDICTION OVER PETITIONER'S MOTIONS FOR PRELIMINARY INJUNCTION CHALLENGING THE CONSTITUTIONALITY OF THE THIRD CONGRESSIONAL DISTRICT IN THE STATE OF FLORIDA.

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Petition For A Writ Of Mandamus
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OPINION BELOW

There are no official or unofficial reports of the opinion delivered in this matter. A copy of the district courts opinion is reproduced in Appendix A.

JURISDICTION

The discretionary jurisdiction of this Court is invoked under the All Writs Clause, 28 U.S.C. Section 1651(a). The writ of mandamus is sought in support of the Supreme Court's appellate jurisdiction. The Supreme Court has appellate jurisdiction to review any district court order either granting or denying a motion for a preliminary injunction in any civil action required by any Act of Congress to be heard and determined by a district court of three judges. See 28 U.S.C. Section 1253. In aid of its appellate jurisdiction, the Supreme Court has jurisdiction to issue a writ of mandamus directing the three judge panel of the United States District Court, Middle District of Florida consisting of Chief Circuit Judge

Tjoflat, District Judge Hodges, and District Judge Sharp to exercise its jurisdiction by either granting or denying the Petitioner's motions for preliminary injunction.

The relief sought is not available from the Eleventh Circuit Court of Appeals. First, the district court order abstaining from exercising jurisdiction was entered by the Chief Judge of the Eleventh Circuit. Secondly, the basis for abstention was the pendency of the appeal of *DeGrandy vs. Wetherell* before the Supreme Court. Thirdly, only the Supreme Court has appellate jurisdiction from the decision of the three judge *DeGrandy* court and the three judge *Sullivan* court. Appropriate relief can only be granted by the Supreme Court under such circumstances.

STATEMENT

The Petitioner, ROD SULLIVAN was the Plaintiff in a suit brought against JIM SMITH, SECRETARY OF THE STATE OF FLORIDA filed in the United States District Court, Middle District of Florida, challenging the apportionment of Congressional districts. A three judge panel was appointed to hear the challenge of the Petitioner to Florida's newly created Third Congressional District. A map of the newly created district is attached hereto and marked as Exhibit "B." The Petitioner filed two motions for preliminary injunction. The first motion requested the district court to find that Florida's newly created Third Congressional District was unconstitutionally drawn and to direct the State of Florida to redraw the districts in a constitutional fashion. The second motion requested that since the time for election was approaching, the district

court utilize the redistricting default provisions enacted by Congress in 2 U.S.C. Section 2A(c)(2). Under the default provisions, Congress has directed that where a State has not been constitutionally redistricted, elections will be conducted in accordance with the prior redistricting plan with all additional seats being submitted to the electorate in an at-large election.

On August 24, 1992, the three judge court abstained from exercising jurisdiction on the basis that the Supreme Court had stayed the enforceability of the redistricting plan, *Wetherell vs. DeGrandy*, 1992 U.S. Lexis 4755 and 4757 (July 16 & 17, 1992) but that the State of Florida had voluntarily decided to conduct the 1992 Congressional election in accordance with that stayed redistricting plan. See Appendix A.

Since the Supreme Court had stayed the enforceability of the redistricting plan and the Petitioner was aggrieved by the State of Florida's decision to voluntarily proceed with elections pursuant to the stayed redistricting plan, the district court had a duty to exercise its jurisdiction over the Petitioner's motions for preliminary injunction and either grant the motions and direct that elections be conducted in accordance with 2 U.S.C. 2A(c)(2) or deny the motions and permit the Petitioner to appeal the decision to the Supreme Court. Abstaining from exercising jurisdiction constituted abuse of the district court's discretion.

ARGUMENT

I. THE THREE JUDGE PANEL IN THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA ERRED IN ABSTAINING FROM EXERCISING JURISDICTION OVER THE PETITIONER'S MOTIONS FOR PRELIMINARY INJUNCTION. A CLAIM BY A CANDIDATE FOR PUBLIC OFFICE THAT CONGRESSIONAL REDISTRICTING HAS BEEN ACCOMPLISHED IN AN UNCONSTITUTIONAL FASHION SHOULD HAVE BEEN CONSIDERED BY THE DISTRICT COURT.

Congress has enacted means by which Congressional elections may be conducted in the absence of the adoption of a constitutional redistricting plan after a decennial reapportionment. See 2 U.S.C. Section 2A. That statute is presumed to be constitutional. Congress has created special remedies for candidates and citizens challenging the reapportionment process and aggrieved by the apportionment of Congressional seats. See 28 U.S.C. Section 2284(a) and 28 U.S.C. Section 1253. By abstaining from exercising jurisdiction over the Petitioner's motions for preliminary injunction, the district court has deprived the Petitioner of Congressionally created remedies to redress civil rights violations.

By refusing to consider the Petitioners case, the District Court has stated, sub silentio, that non-minority Americans lack the same basic civil rights that African-American and Hispanic citizens hold. That the rights of a white candidate for public office are too insubstantial to consider in the face of a tidal wave of sentiment favoring racial gerrymandering to achieve the Court's concept of

racial propriety. In fact, no such tidal wave of support exists for racial gerrymandering.

White and non-white citizens alike know that what has occurred in the 1992 redistricting process is both culturally improper and historically unconstitutional. The District Court would not have permitted Congressional elections to take place if districts had been drawn with the purpose of excluding non-white candidates from serving in Congress by the means of creating non-compact, racially gerrymandered districts. The District Court's inaction resulted in it treating a complaint of a civil rights violation made by the Petitioner differently, based solely upon the race of the complainant. Abstention in this case violated the Constitutional concept of equal protection.

II. THE COMPLETION OF CONGRESSIONAL ELECTIONS DID NOT RENDER MOOT THE PETITIONER'S DEMAND FOR A PRELIMINARY INJUNCTION. IF CONGRESSIONAL ELECTIONS HAVE BEEN CONDUCTED IN CONGRESSIONAL DISTRICTS WHICH HAVE BEEN UNCONSTITUTIONALLY DRAWN, THE DISTRICT COURT HAS JURISDICTION TO FASHION APPROPRIATE RELIEF WITH RESPECT TO THE CURRENT ELECTION AS WELL AS WITH RESPECT TO FUTURE CONGRESSIONAL ELECTIONS.

The Petitioner's motions for preliminary injunction, while they requested remedies which anticipated that the election had not yet been conducted, were not rendered moot by the election. A Congressman elected in an unconstitutionally created district has no constitutional

claim to represent the State of Florida in Congress. Even if the courts decline to disturb the outcome of the 1992 elections, the district remains unconstitutionally drawn and four more Congressional elections are scheduled before the next redistricting. The three judge panel should be directed to hear the Plaintiff's motion for preliminary injunction even though the election has been conducted and fashion whatever remedies may be appropriate if it finds that the Third Congressional District was unconstitutionally drawn.

The newly elected Congress lacks any claim to being a legitimately elected legislative body. Congressmen from "minority access districts" lack any basis to claim that they were elected on any basis other than by the judicial action of the DeGrandy court. Even those persons elected in Congressional districts which are not classified as "minority access districts" did not come by their Congressional seats constitutionally. The "ripple effect" caused by packing minorities into other districts unfairly gave primarily white and conservative candidates an unfair advantage in those districts.

Every American owes a duty to the Constitution to resist an unconstitutionally elected Congress. Its statutes, its taxes, and all of its legislative actions would lack Constitutionality. All those who have sworn to preserve and defend the Constitution of the United States of America have a duty to consider whether or not they owe allegiance to this government. The fact that elections were conducted by the State of Florida on a voluntary basis before the Supreme Court ruled on the Constitutionality of the DeGrandy redistricting plan does not

make it a fait accompli. The preservation of Constitutional means of electing Congressmen is more important than any legislative measures that might be accomplished in the spring of 1993.

This Court should declare the 1992 congressional elections in the State of Florida to be null and void. Rather than wait for redistricting, the Court should then order the elections to be conducted in accordance with 2 U.S.C. 2A, under which elections would be held in the preexisting districts with all additional seats being filled by at-large election. Congress would be disrupted by such a Court order but the preservation of the Constitution is more important than preventing temporary disruption in the working of Congress. Congresses come and Congresses go, only the Constitution remains.

If Congress feels strongly that the country needs to racially gerrymander its Congressional districts in order to gain racial equality, then let it propose to the people an amendment to the Constitution which would accomplish that objective. That is how a democratic society works.

CONCLUSION

The Petitioner moves this Court to enter a writ of mandamus directing the district court to exercise its jurisdiction over the Petitioner's motions for preliminary injunction.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ROD SULLIVAN, Plaintiff,	)	
v.	)	92-05650-CIV-ORL-18
JIM SMITH, Secretary of the State of Florida, Defendant.	)	

ORDER

Before TJOFLAT, Chief Circuit Judge, HODGES, and SHARP, District Judges:

BY THE COURT:

This case concerns Florida's newly created third congressional district. Plaintiff Rod Sullivan is a Florida citizen who claims to be a candidate for the United States Congress in Florida's newly created third congressional district ("District 3"). Defendant Jim Smith is Florida's Secretary of the State and is responsible for administering Florida's elections to the United States Congress. Plaintiff asks this Court to declare that District 3 was unconstitutionally constructed and to order that District 3 be redrawn. This three-judge court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 2284(a) (1988), which specifies that "a district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts. . . . "

Less than three months ago, in *De Grandy v. Wetherell*, No. TCA 92-40015-WS, slip op. (N.D. Fla. May 29, 1992), another three-judge court declared that Florida's then extant congressional districting regime was unconstitutional in light of the 1990 federal decennial census. The 1990 census supersedes the 1980 census on which Florida's old districts are based. Due to Florida's population increase relative to the other states, Florida is entitled to increase its representation in the United States House of Representatives from 19 to 23 members. In the absence of a legislative alternative redistricting plan, the three-judge *De Grandy* court fashioned the "1992 Florida Redistricting Plan" creating new congressional districts to be used in 1992 and in subsequent congressional elections. *See De Grandy*, No. TCA 92-40015-WS, slip op. at 32.

The 1992 Florida Redistricting Plan's third congressional district weaves a circuitous path through 14 counties as it stretches from Orlando to Jacksonville to Gainesville. District 3 is oddly configured because the *De Grandy* court combined "several concentrations of minority population, which alone are not large enough to be the basis of a majority black or majority Hispanic district[]" to form one admittedly "web-like" district. *De Grandy*, No. TCA 92-40015-WS, slip op. at 33 (Vinson, J., concurring). District 3 is the subject of the instant litigation.

In two nearly identical orders, the Supreme Court of the United States stayed the enforceability of the *De Grandy* court's redistricting plan. *See Wetherell v. De Grandy*, 1992 U.S. LEXIS 4755 (July 16, 1992); *Wetherell v. De Grandy*, 1992 U.S. LEXIS 4757 (July 17, 1992). Despite the Supreme Court's stay, the State has voluntarily

decided to conduct the 1992 congressional election according to the *De Grandy* court's redistricting plan.

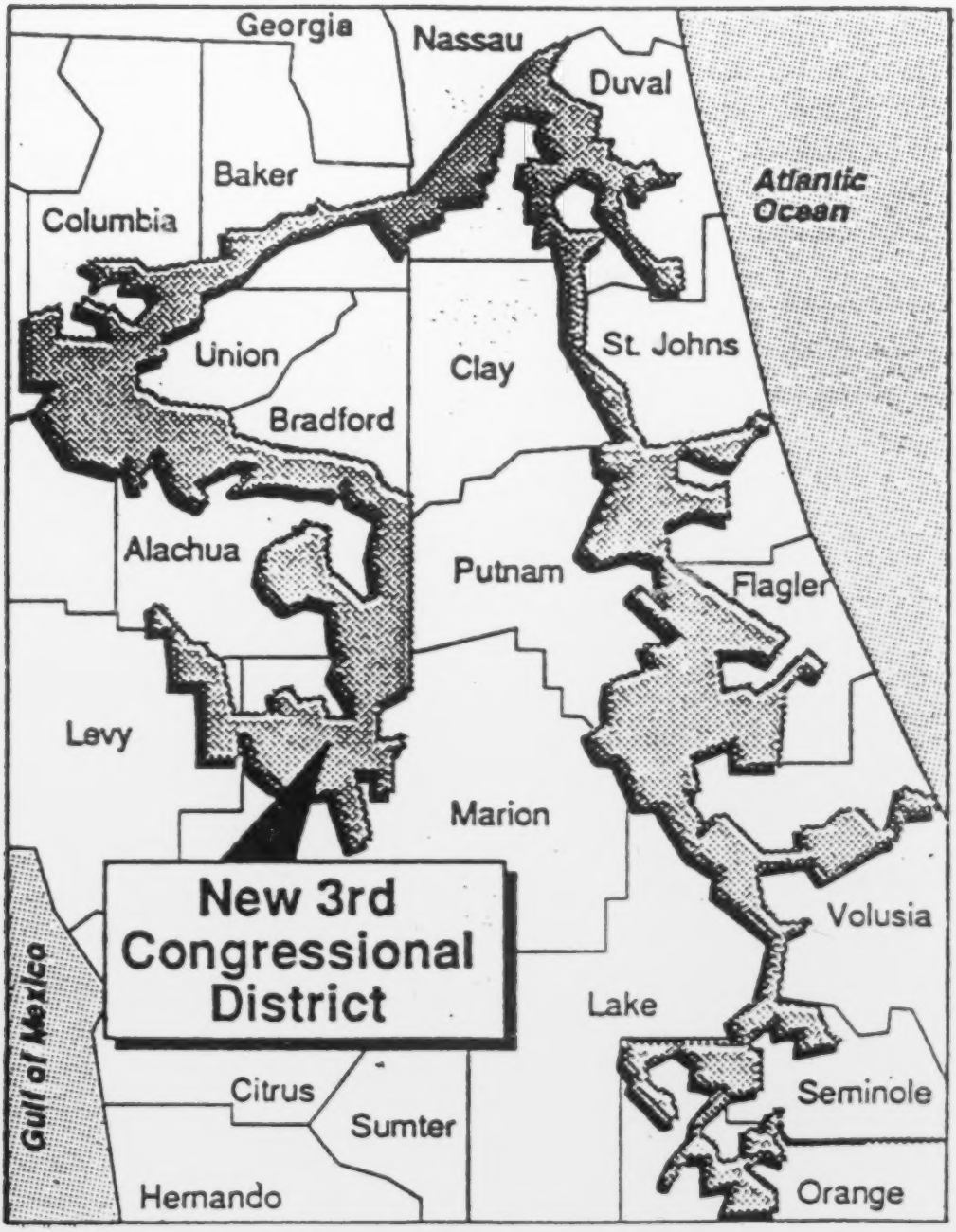
The constitutionality of the *De Grandy* court's redistricting plan is now a matter for the Supreme Court to decide. Similarly, the redistricting plan's potential implementation remains the shared province of the Supreme Court and the three-judge *De Grandy* court. This court's exercise of jurisdiction over Plaintiff's constitutional challenge would be duplicative; all of Plaintiff's constitutional concerns are raised by the *De Grandy* litigation. We decline to interfere with the Supreme Court's and the *De Grandy* court's exercise of their respective jurisdictions. Hence, while we recognize that we have subject matter jurisdiction over this litigation, we abstain from exercising it.

IT IS SO ORDERED.

FOR THE COURT:

/s/ Gerald Bard Tjoflat
Chief Judge United States
Court of Appeals
for the Eleventh Circuit

APPENDIX B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